Public Prosecutor v Rosyatimah bte Neza & Anor

HIGH COURT (IPOH) – PERAK CRIMINAL TRIAL NO 14 OF 1984
PEH SWEE CHIN J
14 NOVEMBER 1988

Criminal Law – Dangerous drugs – Trafficking – Cannabis found in bag in first accused's room – First accused's statement that cannabis belonged to second accused – Whether statement admissible – Whether circumstantial evidence adduced by prosecution sufficient to convict second accused – Presumptions of possession and trafficking raised against first accused – Whether presumptions successfully rebutted – Dangerous Drugs Act 1952, ss 6, 37(b), (d), (g), (da)(vi), 37A & 39B

Evidence – Incriminating statement against second accused made by first accused during investigations into drug trafficking case – Whether admissible – Whether conditions laid down in s 37A of Dangerous Drugs Act 1952 as to admissibility fulfilled – Dangerous Drugs Act 1952, s 37A

Evidence – Circumstantial evidence adduced to convict accused – Quality of – When such evidence is considered sufficient to convict accused

In this case, a police party led by ASP Mohd Azmi bin Mohd Nadzri ('ASP Azmi') raided a shophouse at Jalan Kampong Koh, Sitiawan. They found the first accused standing inside the room and during the search, recovered a red canvas bag from under a bed. Inside the bag was a yellow plastic bag containing dry leaves which were later confirmed to be cannabis and when ASP Azmi asked the first accused to whom the dry leaves belonged, she answered that they belonged to her boyfriend, the second accused. Both accused were subsequently charged under s 39B(2)(a) of the Dangerous Drugs Act 1952 ('the Act') for the offence of trafficking in a dangerous drug.

During the trial, a controversial point incriminating the second accused, both during and at the end of the prosecution case, was whether the answer given by the first accused to ASP Azmi that the cannabis in the red bag belonged to the second accused was admissible. The only other evidence adduced by the prosecution against the second accused were that he had frequented the first accused's room and that he had some clothes in the room of the first accused.

Held, acquitting the second accused and convicting the first accused for the lesser offence of possession instead of trafficking:

(1) Section 37A of the Act would make the first accused's answer to ASP Azmi inadmissible if, inter alia, it was made after her arrest and no caution was administered to her before it was made.

(2) It is the court's view that a person is under arrest already if he is in a state of being watched or guarded to prevent his escape, or from the circumstances it can be implied that his personal liberty has been restrained. In the instant case, ASP Azmi would use force, if necessary, to prevent the first accused from leaving her room or the house and this could be inferred from his evidence and the surrounding circumstances. Together with the fact that no caution was ever administered before the answer that the cannabis belonged to the second accused was given to ASP Azmi by the first accused, the answer was inadmissible.

(3) If the prosecution wished to rely on circumstantial evidence, which was the only evidence against the second accused, such evidence must be inconsistent with any other hypothesis other than that of guilt of the second accused, or such evidence must be such that, if believed, there would be no reasonable alternative to the guilt of the accused. Such was the very poor quality of the evidence against the second accused and on such evidence standing alone, it would be wholly unsafe to convict the second accused and therefore no prima facie case had been established against him.

(4) The first accused, being the tenant of the room from which the cannabis was recovered, and to which room she alone had the key, the court was satisfied that the statutory presumption of the first accused being the occupier because of her having control or management of the room had arisen against the first accused under s 37(b) of the Act. Since the cannabis was found in a zipped-up red canvas bag which was found hidden under the bed of her room, the statutory presumption of concealing the cannabis with her knowledge had also arisen against her under s 37(g). Since the first accused's room was in her exclusive possession because she alone had the key and was the sole tenant (notwithstanding the fact that when she was in the house, her room was unlocked and accessible to many a man), she therefore had in her custody the red canvas bag containing the cannabis. Therefore the statutory presumption under s 37(d) arose such that she was deemed to be in possession of the cannabis and to know the nature of the contents in the red canvas bag. Since the cannabis weighed more than 200 gm, the statutory presumption of trafficking under s 37(da)(vi) also arose against her.

(5) The first accused failed to rebut the statutory presumptions as to possession and thus the court found her guilty of possession under s 6 of the Act. The presumption of trafficking had, on the other hand, been successfully rebutted by her as the court was satisfied that it was more probable than not that she had not trafficked in the cannabis.

[*Obiter*: In the judgment, the court gave an explanation as to the propriety of convicting the first accused for a lesser offence under s 6 without the formality of amending the earlier charge under s 39(B) of the Act and calling upon the first accused to plead thereto. It said that although ss 167 and 169 of the Criminal Procedure Code (FMS Cap 6) do not provide that the charge need not be amended and that the plea of an accused need not be taken thereto, this would depend on the circumstances in each case, always bearing in mind the predominant question as to whether an accused person may be prejudiced thereby.]

[*Editorial Note*: The first accused and the Public Prosecutor have appealed to the Supreme Court vide Criminal Appeal Nos 64 of 1988 and 68 of 1988 respectively.]

Cases referred to

1 *PP* v *Salleh bin Saad* [1983] 2 MLJ 164 (refd)
2 *Sambu* v *R* [1947] MLJ 16 (refd)
3 *Tan Shu En* v *PP* [1948] MLJ 196 (refd)
4 *PP* v *Tan Seow Chuan* [1985] 1 MLJ 318 (refd)
5 *Jayaraman & Ors* v *PP* [1982] 2 MLJ 306 (refd)
6 *Shaaban & Ors* v *Chong Fook Kam & Anor* [1969] 2 MLJ 219 (refd)
7 *Karam Singh* v *PP* [1967] 2 MLJ 25 (folld)
8 *Kartar Singh* v *R* [1952] MLJ 85 (folld)
9 *PP* v *Nordin bin Johan & Anor* [1983] 2 MLJ 221 (refd)
10 *Lew Cheok Hin* v *R* [1956] MLJ 131 (folld)
11 *PP* v *Kau Joo Huat* [1988] 2 MLJ 91 (folld)

12 *Toh Ah Loh & Anor* v *R* [1949] MLJ 54 (refd)
13 *Leow Nghee Lim* v *R* [1956] MLJ 28 (refd)
14 *Chan Pean Leon* v *PP* [1956] MLJ 237 (refd)
15 *PP* v *Ang Boon Foo* [1981] 1 MLJ 40 (refd)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) ss 113, 167, 169
Dangerous Drugs Act 1952 ss 6, 15, 37(b), (d), (g), (da)(vi), 37A, 39A(2), 39B
Evidence Act 1950 s 30

Tun Abdul Majid bin Tun Hamzah (Federal Counsel) for the Public Prosecutor.
Shaharuddin Kassim (*Bachan Singh* with him) for the first accused.
Sidney Augustin for the second accused.

Cur Adv Vult

Peh Swee Chin J: Both accused were charged at the outset before me under s 39(B)(2)(a) of the Dangerous Drugs Act 1952 (hereinafter called 'the Act'), and the accused No 2, viz Nazari bin Kassim, was acquitted at the end of the prosecution case without defence being called; while at the end of the defence, the first accused, viz Rosyatimah bte Neza, whose defence I had called for earlier, was convicted on a reduced charge of s 6 read with s 39A(2) of the same Act and was sentenced to ten years' imprisonment with effect from the date of arrest. I will set out only the material parts of the evidence below.

On 20 September 1984, PW2, viz ASP Mohd Azmi bin Mohd Nadzri (hereinafter called 'ASP Azmi'), received some information. Acting on it, he assembled a police party consisting of Insp Mohd Zam Zam, D/Cpl Ahmad, DPC Wu, W/DPC Hasnah and raided a shop house at No 138, Jalan Kampong Koh, Sitiawan. They went up to the first floor where he met a female Malay called Rosnorhayati who pointed out to him a room, on the same floor, the door of which was ajar. He found accused No 1 standing inside the room. He informed her of his identity and told her that he would search her room. He, Insp Zam Zam and W/DPC Hasnah entered the room while the remaining two members of the police party waited outside the room. ASP Azmi, during the search, recovered a red canvas bag with the name of 'Anchor Draft' on it, and it was recovered from under a bed. He then unzipped the bag and found inside it a yellow plastic bag containing dry leaves believed to be cannabis, 15 small pieces of brown paper and one inner rubber tube of a tyre. He asked accused No 1 to whom the dry leaves belonged and she answered that they belonged to her boyfriend called Nazari bin Kassim, and he said pointedly he had no intention to arrest her.

I pause to mention that the admissibility of her answer, ie that the dry leaves belonged to her boyfriend Nazari (ie accused No 2), had been a bone of contention between learned counsel and learned deputy and about this I would have more to say later.

ASP Azmi continued the search and he did not find anything else. He then instructed for the photographs to be taken and placed her under arrest and instructed W/DPC Hasnah to handcuff her.

The following day, on another piece of information received, he went with DPC Wu to the naval base at Lumut and arrested one navy personnel called Nazari bin Kassim (accused No 2) who was searched and nothing was found. He then proceeded to accused No 2's ship 'Seri Indera Bakti' and on board the ship, he searched accused No 2's locker to which the accused No 2 had a key. From the locker he recovered accused No 2's restricted passport and a bunch of three keys.

In cross-examination, he stated that the information before the police raid was received at about 12.30 pm relating to the room and the person involved or believed to be involved. He said that on his police party approaching the said room, armed with the information that he had, he would apprehend any person escaping from the room. The two policemen stationed outside the room were not on guard, but were merely standing outside. After discovering the dry leaves, he would not have allowed accused No 1 to go anywhere. He said further that after discovering the dry leaves, before asking accused No 1 the question as to whom they belonged, if accused No 1 had run away from the room, he would not instruct his men to arrest her. (In the same breath), he said that he would not allow her to escape. He did not agree that a person could be placed under arrest without being handcuffed and that if someone submitted to custody he would still handcuff him.

He agreed that accused No 1 looked surprised. He told her that he had reason to believe that cannabis was in the room. He said that the view of the bag under the bed was not obstructed by anything. He said there were three other rooms besides accused No 1's and he didn't search them. From in front of the threshold of accused No 1's room, the bathroom and the kitchen on the same floor were not visible. At no time had accused No 1 admitted that the said red bag and its contents belonged to her.

He said that accused No 1 was a bar waitress at the time of the said raid but he did not know if the other occupants of other rooms were bar waitresses. The first thing he asked Rosnorhayati who was in the hall on his arrival was where the room of Rosyatimah (accused No 1) was. He did not see accused No 2 there, neither did he find any belongings of accused No 2. He did not know that Sofie (whom other waitresses referred to as Saffie) was one of the persons who had frequented the house. He had come across the name of Sofie in the investigation paper.

A member of the police party, viz Insp Zam Zam, gave evidence also confirming the evidence of ASP Azmi

on all material points. He also said that if accused No 1 had wanted to leave the room, she would not have been allowed to do so and he would have restrained her. If she resisted his attempt to restrain her, he would have her handcuffed. He also requested Insp Mat Alias bin Abdullah to record a cautioned statement from her. He also requested one Insp Zainuddin to record another cautioned statement from accused No 2. He also went back to the house of accused No 1 on 26 September 1984. In the room where accused No 1 was first seen by the police party, he recovered some clothes, consisting of a shirt with the number 809282 printed on it. He took possession of it and five other shirts and four pairs of trousers. He also recovered in the same room one black metal crash helmet (one usually worn by a rider of a motorcycle) and one pair of scissors. He said he did not try out the bunch of keys recovered by ASP Azmi from accused No 2 on any lock. ASP Azmi had also said he did not also try out any of the three keys from the bunch on any lock. Insp Zam Zam further said that accused No 1 had not tried to run away and that he did not know if accused No 1 was taken for a urine test and that the test was negative. Of the six shirts, only three shirts bore the number 809282. Of the four pairs of trousers, one pair had the number 809282, two pairs had no number at all, while the last pair had the number 1187. Of the four pairs of trousers, two pairs were of the same size and the other two pairs were of different sizes. The three other occupiers of three respective rooms were all bar waitresses, like accused No 1. They were Rokiah, Zaiton and Rosnorhayati.

Insp Zam Zam agreed that in the report lodged by ASP Azmi in this case, no mention was made about the question asked of the accused No 1 as to whom the dry leaves belonged. Rokiah had told him that one Sofie had frequented the place; and that he was a former navy personnel who had been sacked. He had found or ascertained that accused No 2 was on board the navy ship 'Sri Indera Sakti' on the day of accused No 1's arrest.

Yet another member of the police party gave evidence; he was D/Cpl Ahmad bin Daud who confirmed the evidence of ASP Azmi on all material points. One of the four girls he recognized as Hayati had been arrested for being involved in one cannabis case, in connection with which he had arrested her at some other house. At first, he said, he was asked to guard outside the room (in which the cannabis was recovered).

One of the accused No 1's housemates, viz Zaiton gave evidence; inter alia, she identified the room occupied by accused No 1. She said sometimes male or female friends occupied accused No 1's room which accused No 2 also sometimes frequented. Many friends, both men and women, visited accused No 1 and not just accused No 2. She said she last saw accused No 2 two months before the date of her arrest. She had seen accused No 1 bring the red canvas bag (ie P3). She agreed there was a room over the floor where she and other girls stayed; it appeared to be in some sort of attic. One Cpl Hussain, a bachelor, (also from the navy) sometimes slept there. Accused No 1 and Rokiah worked in the same pub. In connection with the said red canvas bag which contained the crash helmet, she said that accused No 1 had no motorcycle. She said she had seen accused No 1 having a bag similar to the said canvas bag, ie P3. Quite a number of visitors to the house possessed motorcycles, which were all parked downstairs.

Yet another housemate of accused No 1 gave evidence; viz Rosnorhayati, who gave somewhat similar evidence, and for the sake of brevity, I will only refer to such parts of the evidence as may be necessary.

Rokiah, not only a housemate but also a colleague of accused No 1, gave evidence which was marked by her candour unlike the evidence of the other girls which was affected by some degree of evasiveness. Each of the four girls on the same floor, including herself, she said, had a man staying with her, and accused No 2 was staying with accused No 1. Two nights before the date of arrest, she saw at the pub where she worked with accused No 1, accused No 2 outside the pub. He had come asking accused No 1 for the key to the latter's room for the stated purpose of sending his soiled clothes there. At that time, accused No 1 was drunk.

Rokiah further said she knew two ex-navy personnel called Saffie and Rahmat respectively. The said Saffie had free access to her room, and had also a motorcar with the registration number PAU 5511. After the arrest of accused No 1, the said Saffie had disappeared. She further stated that the first accused was a habitual drinker, and one day before the arrest, the first accused was completely drunk and she had to be taken home by Saffie and Rahmat in the said motorcar. Accused No 1 had to be carried to her own room. She thought somebody had mixed accused No 1's drink with something (obnoxious). She said further Cpl Hussain was a former boyfriend of accused No 1 and he had free access to the first floor.

She said further that on the evening before the date of arrest, Saffie came to the house. Apart from accused No 2, accused No 1 had other men friends who did come to their house and had baths and changed their clothes in accused No 1's room before going out. These men were civilians or navy personnel and some of them spent the night in accused No 1's room.

She said accused No 1 was very popular where she worked. Accused No 2 had no key to accused No 1's room otherwise he wouldn't have called at the pub for it.

The chemist who gave evidence confirmed after analysis that it was cannabis that was found in the red canvas bag.

Navy lieutenant Selveswaran said there was a rating called Saffie.

A highly controversial point incriminating accused No 2, both during and at the end of the prosecution case, was whether the answer given by accused No 1, Rosyatimah, to ASP Azmi to the effect that the cannabis in the red canvas bag had belonged to accused No 2 was or was not admissible.

I held that it was not admissible after hearing arguments of all counsel for the following reasons.

Section 37A of the Dangerous Drugs Act (in pari materia with s 113 of the Criminal Procedure Code) says as follows:

> 37A *Admission of statement in evidence.*
>
> (1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs and whether or not interpreted to him by any other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself at a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that no such statement shall be admissible or used as aforesaid –
>
> (a) ...
>
> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words of like effect –
>
> 'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.'
>
> Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

It could not be disputed in the instant case that no caution was ever administered before the answer was given to ASP Azmi by accused No 1.

I was quite satisfied that there was time to administer such a caution if ASP Azmi had the intention to administer it from the evidence set out above.

Section 37A of the Act (and for that matter, s 113 of the Criminal Procedure Code) would make accused No 1's answer to ASP Azmi *inadmissible* if, inter alia, it was made *after* her arrest, and no caution was administered to her before it was made. The issue was therefore whether she was under arrest at the time of giving this answer. If she was, the answer would be inadmissible, and if not, admissible.

On the meaning of the word 'arrest' there appeared to be two diverging lines from the reported cases. When referring to such cases, they would also use the words 'in custody' in this connection. Being in custody would, in my view, without any doubt, include or imply or presuppose a prior arrest.

On the one hand it has been held that before a person is arrested, there must be an actual arrest: see *PP* v *Salleh bin Saad*.[1]

On the other hand, it has been held and it is also my view that a person is under arrest already if he is in a state of being watched or guarded to prevent his escape: see *Sambu* v *Rex*[2] and *Tan Shu En* v *PP*;[3] or from the circumstances, it can be implied that his personal liberty has been restrained: see *PP* v *Tan Seow Chuan*.[4]

It was submitted, however, that the decision of the Federal Court in *Jayaraman & Ors* v *PP*[5] was an authority for the proposition that there should be an actual arrest. It would be necessary to analyse somewhat that decision. In *Jayaraman's* case,[5] the Federal Court was considering s 113 of the Criminal Procedure Code (which is in pari material with s 37A of the Act), but the decision would be equally relevant on s 37A of the Act.

The learned Lord President, Tun Suffian, first considered s 15 of the Criminal Procedure Code which is set out as follows:

> 15 *Arrest, how made.*
>
> (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest such officer or other person may use all means necessary to effect the arrest.

His Lordship next quoted the passage of Lord Devlin from the Privy Council case of *Shaaban & Ors* v *Chong Fook Kam & Anor*[6] as follows:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make inquiries.

The important words in the passage of Lord Devlin's advice above appeared to be 'it (arrest) does not occur when he stops an individual to make inquiries'. His Lordship Tun Suffian further said that 'the question would depend on the facts of each case'.

The facts in that cited case were as follows. Idols in a Hindu temple had been destroyed by some persons and the police were alerted. Two Indians in this case lodged a

report to the police of another attack. (They were subsequently charged under s 304 of the Penal Code for killing some attackers of the idols.) The police corporal went to the temple to investigate, in pursuance of such report, such attack and the two Indians might be material witnesses. The corporal told the two Indians and others (all such persons were not accused persons at that time but appeared to be complainants about the attack on the idols) to wait and not to leave the temple.

His Lordship came to the conclusion that the corporal had merely stopped these complainants about the attacks on the idols in order to make inquiries into such attack and the answers given by these two Indians and others were admissible as they had not been arrested at the time of such answers despite the absence of a caution administered to them. His Lordship further concluded to the effect that these two Indians were not under arrest at the time of giving answers, for apart from the fact that the corporal was making inquiries of them as they might be material witnesses, and in any event he did not tell them he was arresting them, neither did he use force to restrain them or make it clear by words or conduct that he would, if necessary, use force to prevent them from going where they might have wanted to go.

The judgment of his Lordship would not appear, in my opinion, to support the view that there need be any actual arrest at all, and that the question of whether a person is under or not under arrest would depend therefore on the facts of each case.

Looking at the evidence of ASP Azmi in the connection, I had no doubt that he would use force, if necessary, to prevent accused No 1 (Rosyatimah) from leaving her room or the house; this could be inferred from his evidence and the surrounding circumstances. He had just recovered the cannabis from the red canvas bag recovered from under the bed in accused No 1's room. He said, inter alia, that armed with the information received before the raid on accused No 1's room, he would apprehend any person escaping from the same room. Two policemen were instructed to stand outside the same room. He said after discovery of the cannabis that if accused No 1 had run away from the same room, he would instruct his men to arrest her. He maintained, however, to the effect that a man could not be arrested without being handcuffed, and in my view, such handcuffing would be an exercise ex abundanti cautela, it being, after all, one of the usual steps to prevent her escape. I therefore held that the answer of accused No 1 that the cannabis had belonged to accused No 2 was inadmissible.

Without such evidence, the evidence against accused No 2 would be that he had frequented the room of accused No 1 more frequently than other men who had access to accused No 1's room. The other evidence was that accused No 2 had some clothes in the room of accused No 1's room, such clothes having been mixed up with some other clothes of other person or persons. The inner tube of a motorcycle's tyre found in the red canvas bag could equally belong to accused No 2 and other men. Accused No 2 had once asked for the room key from accused No 1 at the pub where she worked in order to send to the room his soiled clothes and no one in the case had even suggested that he was sending to her room cannabis. If the prosecution wished to rely on circumstantial evidence, which was the only evidence against accused No 2, such evidence must be inconsistent with any other hypothesis than that of guilt of accused No 2: see *Karam Singh* v *PP*,[7] or such evidence must be such that, if believed, there would be no reasonable alternative to the guilt of the accused: see *Kartar Singh* v *R*.[8]

Such was the very poor quality of the evidence against the second accused and on such evidence standing alone, I felt it would be wholly unsafe to convict accused No 2 and therefore no prima facie case had been established against him. The position would have been the same even if such circumstantial evidence was combined with the incriminating answer of accused No 1 given to ASP Azmi referred to above, assuming such answer to be admissible instead. Accused No 1 was a co-accused of accused No 2 and though such answer, by virtue of s 30 of the Evidence Act could be considered by the court against accused No 2, such answer would have to be shored up with other evidence that was cogent and which had real probative value to the charge, per the then Lord President, Raja Azlan Shah in *PP* v *Nordin bin Johan & Anor*.[9] I asked myself if the circumstantial evidence against accused No 2, referred to earlier and apart from accused No 1's answer to ASP Azmi, was such cogent evidence with such real probative value to the charge. The result was that I had grave doubts that such circumstantial evidence referred to earlier was of this variety of evidence at all. Such being the case, I concluded that no prima facie case had been established against accused No 2 whom I acquitted and discharged without calling for his defence.

In regard to a question whether defence should be called in respect of accused No 1, the learned deputy had relied on the statutory presumptions under s 37(b), (g) and (d), and (da)(vi) (presumption of trafficking) set out as follows:

> 37(b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;
>
> (g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises;

(d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

In my view, being the tenant of the room from which the cannabis was recovered, and to which room she alone had the key, I was satisfied that the statutory presumption of her being the occupier because of her having control or management of the said room had arisen against accused No 1 under s 37(b).

I was satisfied further that since the cannabis was found in a zipped-up red canvas bag which was found hidden under the bed of accused No 1's room, the statutory presumption of concealing the cannabis with the knowledge of accused No 1 had arisen also against accused No 1 under s 37(g).

I was further satisfied that since accused No 1's room was in the exclusive possession of accused No 1 because she alone had the key and was the sole tenant, (notwithstanding the fact that when she was in the house, her room was unlocked and accessible to many a man), she therefore had in her custody the red canvas bag containing the cannabis. Therefore the statutory presumption under s 37(d) arose such that she was deemed to be in possession of the cannabis and to know the nature of the contents or substance in the red canvas bag, ie the cannabis.

Since the cannabis weighed more than 200 gm, the statutory presumption of trafficking also arose against her.

Having regard to the statutory presumptions invoked by the prosecution in aid of itself, the court found a prima facie case established against accused No 1 whose defence was then called.

Accused No 1, aged 24, waitress at a pub, gave evidence, inter alia, to the effect that in the course of her job, she had to entertain customers and take all sorts of drinks. She had many men friends among whom were accused No 2 and one Hussain. When at home, her room would be unlocked, and it remained unlocked when she went to the toilet or bathroom some distance away. She knew one Saffie described by her as the boyfriend of Rokiah ('PW9') who had come to her room to listen to music from her transistor radio. He did so on 19 September 1984.

On 18 September 1984, two days prior to her arrest, she had started work at 8 pm and accused No 2 had come to the pub to see her to ask for her room key to send his soiled clothes there. He later returned the key shortly after 10 pm. Accused No 1 usually washed the clothes of accused No 2. She said that the room occupied by the said Hussain was on the top floor (above her floor). She had no 'L' driving licence for motorcycle and accused No 2 had a motorcycle.

On 19 September 1984, accused No 2 came at about 5.30 pm, holding in one hand a plastic bag which was like the plastic bag with two layers, ie P4 and P5, containing the cannabis, recovered by the police. He was holding with the other hand some brown paper which was similar to P6 (being 15 pieces of brown paper). She asked accused No 2 what it was and he said 'ganja', but he didn't show the contents of the plastic bag he was holding to her. Accused No 2 told her he was handing the cannabis to Saffie who was then in Rokiah's room. She followed him to Rokiah's room and saw accused No 2 handing over what he was holding to Saffie in that room.

That night at the pub, she said that she took a number of different drinks, and she told Rokiah she was drunk and wanted to go home. When arriving at the house, she had to be helped going upstairs and she then fell asleep. On the next day, at about 1.15 pm when she was dressing up, combing her hair and applying make up, the police party raided her room. When told that they wanted to search the room for 'ganja' she was shocked and surprised. She told them to go ahead. She was asked to take out whatever that was under the bed. She then took out the red canvas bag, which she said she used to bring along on her return to kampong in Johore Bahru once a year. She took out from the red canvas bag three empty plastic bags from 'Avon'. She did not know how the rubber inner tube of a motorcycle (which was found inside the red canvas bag) came to be inside it. She realized it was cannabis when the police showed it to her. On 19 September 1984 the accused No 2 did tell her that it was cannabis that he was carrying. She was totally unaware of the cannabis in her room.

She said accused No 2 and she were together for about one year prior to her arrest. She drank a lot of liquor on the eve of her arrest. Rokiah was with her when she was taken back from the pub to her room drunk. She had broken off from Hussain one year prior to her arrest. She allowed her friends to change clothes in her room.

She did follow accused No 2 to Rokiah's room on the day before the arrest. She said Saffie was Rokiah's boyfriend. Accused No 2 did not tell her why he said to her that it was important that she should give the key to her room at the pub. She was referred to a statement made to the police earlier in which she had said accused No 2 had shown the cannabis to her the day before her arrest. She admitted making the statement. She did not know whose helmet it was. She said the drug found in the bag was a frame-up against her.

Apart from accused No 2, the names of her other boyfriends were Hussain, Sulaiman, Ramli, Azman, Abdul Aziz, Yeop, Man and others whose names she

could not remember. She said accused No 2 normally used a crash helmet. She said Hussain was not happy with her when they broke off. On the day before her arrest, Saffie had the opportunity to plant the cannabis in her room. He had tried to make advances to her but they were rejected. He was jealous because she was close to accused No 2. About the words in the statement about accused No 2 showing cannabis to her, viz '... serta menunjukkan ganja yang telah dimasukkan dalam plastik ...'; she explained that by these words, she did not mean that accused No 2 had actually showed her the cannabis. Despite an application to impeach her credit, I found it had not been impeached, but the court warned itself to treat her evidence with caution.

Rokiah was recalled to the box and she confirmed that her boyfriend called Saffie had been handed a yellow plastic bag by accused No 2 and the yellow plastic bag (of two layers) which had contained the cannabis involved in this case was described as being similar in colour to the one she saw. She said Saffie took out the contents which she described as sticky or wet and 'greenish' but the cannabis recovered by the police now shown to her was yellowish and dry. The said Saffie asked her for permission to keep the plastic bag in her room and she did not allow it. Then accused No 1 was in the bathroom and accused No 2 had joined her there. Saffie told her he had brought the cannabis from Thailand. Saffie brought the plastic bag of cannabis to accused No 1's room when accused No 1 was in the bathroom. Accused No 1 was not a drug addict but her boyfriend called Hussain was.

After hearing submissions of both counsel, accused No 1 was convicted on a lesser charge under s 6 read with s 39A(2) of the Dangerous Drugs Act and sentenced as stated before.

I feel I ought to give an explanation as to the propriety of convicting accused No 1 for a lesser offence under s 6 without the formality of amending the earlier charge under s 39(B) of the Act, and calling upon accused No 1 to plead thereto.

Section 169 of the Criminal Procedure Code ('CPC') sets out as follows:

> 169 *When offence proved is included in offence charged.*
>
> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it.

Section 167 of the Criminal Procedure Code also provides as follows:

> 167 *When a person charged with one offence can be convicted of another.*
>
> If in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

Although ss 167 and 169 do not provide that the charge need not be amended and that the plea of an accused need not be taken thereto, in my view, this would depend on the circumstances in each case, bearing in mind always the predominant question as to whether an accused person may be prejudiced thereby.

In the instant case, the defence evidence and submissions had by then concluded, and considering the nature of s 6 of the Act, there would be utterly no need for accused No 1 to adduce further evidence or for her counsel to make any further submission on her behalf, thereby causing no possible prejudice to accused No 1. The formality of formulating a charge would be useless at that stage for these reasons, and at best it would be an excess of caution.

Accused persons in murder cases have been for a long time often convicted for an offence of homicide not amounting to murder, obviously under these sections. These cases provide a classic example of the sort of discretion which I exercised.

I must hasten to add that the exercise of such a discretion ought to be carried out according to certain well-established principles. I respectfully adopt the dictum expressed by Taylor J, in connection with the propriety of convicting a person on a lesser and unframed charge, in the Singapore case of *Lew Cheok Hin* v *R*[10] in the following words:

> There are two main tests. First, the facts must be such that the unframed charge was available from the start, and could have been framed and tried concurrently under s 165; secondly, the evidence must have been presented in such a way as to raise all the same issues of facts as would have been raised, had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the court must be satisfied that the evidence for the defence would have been the same.

The s 165 referred to in the above passage was found in Singapore's Criminal Procedure Code then.

In the instant case, the proof of a charge of trafficking under s 39(B) of the Act could be said to have two stages; the first being proof of possession of the drug in question, and the second trafficking, in respect of which the prosecution could and did conveniently rely on the weight of 200 gm or more as the weight of the cannabis in this case as raising a statutory presumption of trafficking. On the other hand, the proof required under s 6 would merely be the possession of the drug in question. At the

end of the defence I found that the presumption of trafficking had been rebutted, but the presumptions relating to possession had not been so rebutted, hence the conviction for possession under s 6 of the Act.

Alas, an error would appear to have crept into this case. One or two weeks after the verdict in the instant case, learned defence counsel for accused No 1 saw me in chambers and drew my attention to the fact that his client should have been sentenced under s 12(3) of the Act, which carried a maximum of five years' imprisonment, and not sentenced under s 12(2) read with s 39(A)(2) of the same Act; the said s 39(A)(2) carrying a range of sentences between five years' imprisonment and imprisonment for life, and whipping of not less than ten strokes (from which women so convicted are of course exempted by virtue of s 289 of the CPC). He intimated further that s 39(A)(2) was an amendment which should not apply retrospectively to his client, having regard to the date of her offence.

Unfortunately, none of the three counsel, including the learned deputy, had drawn my attention to this at the trial and I had relied on a booklet containing the Dangerous Drugs Act 1952 incorporating all amendments as at 10 August 1986 (not published by the Malaysian Current Law Journal Sdn Bhd) and it gave no indication whatever as to any amendment having been effected and the relevant date of such amendment. The library clerk had, beside s 39A(2), written the words 'Act 659' which also appeared by the side of s 37 relating to various statutory presumptions in the same booklet.

Section 39A(2) appears to have been amended and gazetted on 31 December 1986 and to have come into force on 1 January 1987. The Supreme Court is invited to consider, with my great respect, and provided, of course, that the Supreme Court agrees with the conviction of accused No 1 for a lesser offence under s 6 of the Act, reducing the ten years' imprisonment to the maximum of five years' imprisonment or less.

In this connection, with the neat booklet incorporating all the amendments, one hankers for those old booklets published by government printers with all the slips recording such amendments pasted up on them, a bit in tatters perhaps, but certainly more oversight-proof.

I will now explain my findings at the end of the defence case and after hearing submissions from both sides. I bore in mind that accused No 1 would be required to rebut, in particular, the following statutory presumptions on a balance of probabilities that (i) she was aware of the nature of the cannabis recovered from her room; (ii) that she was aware that the cannabis was concealed in her room, and (iii) that she was a trafficker (by virtue of the weight of the cannabis recovered).

I found as follows:

(a) On the day of her arrest, and on the day previous to the day of arrest, she alone had the key to her room.

(b) She and accused No 2 were lovers and she was so intimate with him that she even washed his soiled clothings. She, more probably than not, was prone to tolerate the wrongdoing of accused No 2.

(c) The accused No 2 had shown her a plastic bag the day before her arrest, and told her that it contained cannabis.

(d) She was very drunk the night before the day of her arrest and had to be carried home in a drunken stupor.

(e) She was a drunkard and spent a large part of waking hours getting drunk. She, therefore, more probably than not, had a rather hazy perception of her surroundings.

(f) She knew she was associating with potential traffickers like accused No 2 and Saffie who were dealing in cannabis.

(g) Accused No 2 did bring the cannabis onto the premises, on the day before the day of her arrest, and the court accepted the evidence of Rokiah.

(h) The cannabis was placed and hidden by either accused No 2 or Saffie and this took place while accused No 1 was in the bathroom.

(i) Accused No 1, more probably than not, had been put on inquiry as regards the distinct possibility of the cannabis being put in her room, but she took no positive steps to ascertain it because, first, she was busy washing clothes in the detached bathroom some distance away; secondly, she could be that night preparing to go to work at the pub later; thirdly, that she was dead drunk that night and had to be carried home; fourthly, probably she loved accused No 2 too much to tackle him as to whether he had actually hidden any cannabis in her room. She did not herself place or hide the cannabis under the bed.

(j) She was not an addict. She had no power of disposal over the cannabis found.

(k) She had not trafficked in any way in the cannabis found.

(l) She had not satisfied the court on a balance of probabilities that she was unaware that the cannabis recovered was hidden in her room before its recovery.

(m) She had, however, satisfied the court on a balance of probabilities that she did not know the actual part of the room where such cannabis recovered was hidden by accused No 2.

I therefore found her guilty of possession for having failed to rebut the statutory presumptions as to possession except that the presumption of trafficking had, on the other hand, been successfully rebutted by her as the court was satisfied it was more probable than not that she had not trafficked in the cannabis, having regard to and

despite a myriad of meanings given by the Act to the word 'trafficking'.

I think I ought to say a few words about the recent Supreme Court case of *PP* v *Kau Joo Huat*,[11] in connection with my finding of accused No 1 having no power of disposal over the cannabis recovered.

That case is authority for saying that on a charge of possession under the Act, it is no longer necessary for the prosecution to prove the ingredient of power of disposal of an accused person over the drug found. This case has no doubt made the decisions hitherto on this particular point obsolete, such as the cases of *Toh Ah Loh & Anor* v *R*,[12] *Leow Nghee Lim* v *R*,[13] *Chan Pean Leon* v *PP*[14] and *PP* v *Ang Boon Foo*.[15]

I naturally followed the decision in this case by finding accused No 1 guilty of possession of the cannabis recovered by the police despite my finding also at the same time that she had no power of disposal over the drug. I would have had no hesitation in acquitting her altogether but for *Kau Joo Huat's case*.[11]

However, the finding of the absence of power of disposal, though it did not render the possession non-incriminating, was in my view, one of relevant factors, though, by no means conclusive standing by itself, for the court to consider if she had, on a balance of probabilities, rebutted the presumption of trafficking. Such presumption could be rebutted usually by surrounding circumstances. Since the court found no such power of disposal, accused No 1, more probably than not, had satisfied the court that prior to her arrest, she was not engaged in some of the activities within the definition of the word 'trafficking' in the Act, viz selling, supplying or distributing any of the said cannabis found in her room. I must add that the said absence of power of disposal was merely one of the findings, as it has been seen.

I therefore convicted her for the lesser offence of possession instead of trafficking under s 39B of the Act.

Order accordingly.

Solicitors: *Shaharuddin & Associates*; *Bachan & Kartar*; *Augustin Negrin & Co.*

Reported by *Ng Sheau Jiuan*

Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL APPLICATION NO CR 54-18-88
ANUAR J
28 OCTOBER 1988

Constitutional Law – Habeas corpus – Application for – Detention grounds referred to applicant's activities in practising and propagating Christianity – Article 11(1) of Federal Constitution guarantees freedom of religion – Whether detention grounds inconsistent with art 11 and outside purview of Internal Security Act 1960 – Federal Constitution, arts 11 & 149 – Internal Security Act 1960, s 8(1)

Preventive Detention – Detention grounds referred to applicant's activities in practising and propagating Christianity – Article 11(1) of Federal Constitution guarantees freedom of religion – Whether detention grounds inconsistent with art 11 and outside purview of Internal Security Act 1960 – Federal Constitution, arts 11 & 149 – Internal Security Act 1960, s 8(1)

This is an application by the applicant for an order that a writ of habeas corpus be issued to direct the respondents to produce the applicant before the court. The applicant was detained pursuant to an order made under s 8(1) of the Internal Security Act 1960 ('the Act') and the grounds stated in the order referred to the applicant's activities to practise and propagate Christianity.

The applicant contended that such activities were not prohibited under the law as under art 11(1) of the Federal Constitution a person was guaranteed freedom of religion. It was also contended that the Act, which is an Act enacted pursuant to art 149 of the Constitution, is inconsistent with art 11 and therefore not valid.

Held, allowing the application:

(1) Under art 149 of the Constitution, any provision in the Internal Security Act designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with any provision of arts 5, 9 or 10 of the Constitution. It is therefore clear that any provision in the Act which is inconsistent with the provision of art 11 of the Constitution shall not be valid.

(2) Although under s 8(1) of the Internal Security Act the Minister may detain a person with a view to preventing that person from 'acting in any manner' prejudicial to the security of Malaysia, the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under art 11 of the Constitution.

(3) It is obvious that the grounds as stated in the detention order are outside the scope of art 149 of the Constitution. Consequently, the order of detention upon the grounds inconsistent with art 11 of the Constitution is outside the purview of the Act and therefore not valid.

[*Editorial Note*: The respondents appealed to the Supreme Court vide Criminal Appeal No 76 of 1988. The Supreme Court (comprising Abdul Hamid LP, Hashim Yeop A Sani CJ (Malaya) and Ajaib Singh SCJ) dismissed the appeal on 24 February 1989. The written judgment of the court will be reported in the next issue.]

Case referred to

1 *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh* [1988] 3 MLJ 29 (refd)